UNWED FATHERS' RIGHTS IN NEW YORK: HOW FAR DOES THE PROTECTION EXTEND?

INTRODUCTION

In the 1990s, it is not uncommon to hear of women bearing children out-of-wedlock. However, the rights of the unwed father have only recently been accorded constitutional protection. For example, some states' laws carried the assumption that an unwed father was by definition an unfit father.[1] Moreover, even where the unwed father maintained a custodial relationship with his children, he possessed no parental rights, unlike his married counterparts.[2] As such, it was inevitable that the Supreme Court would be forced to determine and define the scope of unwed fathers' rights.

Stanley v. Illinois[3] served as the benchmark for unwed fathers' rights. For the first time, the Court recognized that an unwed father's relationship with his children should be recognized by law.[4] In a string of cases after *Stanley*, the Court further defined the rights of an unwed father to include the right to be notified of his child's adoption and the right to veto the adoption.[5] The recognition of the unwed father's protected interests, however, was premised upon the father's prompt manifestation of his parental responsibilities.[6] Only by meeting the "biology plus relationship" requirement, could an unwed father preserve his right to due process.[7]

The New York Court of Appeals, in *In re Raquel Marie X.*,[8] confronted the situation in which a newborn child is placed for adoption soon after birth, thus depriving the unwed father of the right to develop a relationship with his child. Although the court concluded that such fathers are entitled to a protected interest in developing a relationship with their newborn children, the court

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[1] *See, e.g.*, ILL. REV. STAT. ch. 37, para. 701-14 (1969) and *see infra* notes 13-22 and accompanying text.

[2] *See* N.Y. DOM. REL. LAW § 111(b), (c) (McKinney 1977), GA. CODE ANN. § 74-403(1), (2), (3) (Michie 1975). *See also infra* notes 23-40 and accompanying text.

[3] 406 U.S. 645 (1972).

[4] *See* Stanley v. Illinois, 405 U.S. 645 (1972). *See also infra* notes 13-22 and accompanying text.

[5] *See infra* notes 23-57 and accompanying text.

[6] *See id.*

[7] *Id.*

[8] 559 N.E.2d 418 (N.Y. 1990).

held that this interest is contingent upon the father promptly manifesting some parental responsibility, such as paying for pregnancy and birth expenses.[9] By reaching this decision, the New York Court of Appeals was forced to declare the New York adoption consent statute unconstitutional, because the statute focused on the father-mother relationship, not on the relationship between the father and the child.[10] Accordingly, the court formulated interim standards focusing on the father-child relationship to guide New York's courts in determining whether the unwed father is entitled to consent to the adoption of his child.[11] However, in the two and a half years since *Raquel Marie* was decided, the New York Legislature has yet to enact replacement legislation, even though the court's guidelines are not instructive in cases in which the natural father does not know of his paternity.[12]

This Note discusses the need for a clear replacement consent statute enumerating objective standards. Part I examines unwed father's rights as considered by the Court. Part II discusses New York's efforts to comply with the *Stanley* line of cases. Part III analyzes the rights of fathers under *Raquel Marie* and some problems the decision has raised. Finally, Part IV addresses proposed legislation and offers guidelines for such legislation.

I. CONSTITUTIONAL RIGHTS OF UNWED FATHERS

Before the Supreme Court decided *Stanley v. Illinois*[13] in 1972, unwed fathers had almost no rights concerning their children. For example, if the natural mother died or abandoned her children, the unwed father had little or no chance of being granted custody of his children even though he may have been a fit parent.[14] The dilemma of the unwed father was not due to his inability to be a good, nurturing parent, but his status as an unwed father.[15] State statutes, Illinois and New York, for instance, only gave rights to a natural mother of an out-of-wedlock child,

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9 *See In re* Raquel Marie X., 559 N.E.2d 418 (N.Y. 1990). *See also infra* notes 89-110 and accompanying text.

10 *Id.* at 427.

11 *Id.* at 428.

12 *See infra* notes 143-48 and accompanying text.

13 405 U.S. 645 (1972).

14 *See* Stanley v. Illinois, 405 U.S. 645, 650 (1972).

15 *See id.* Illinois law provided that "parents mean the father and mother of a legitimate child, or the survivor of them, or the natural mother of an illegitimate child, and includes any adoptive parent." ILL. REV. STAT., ch. 37, para. 701-14 (1969) (amended in 1985). Note that this definition does not include unwed fathers. Therefore, for practical purposes an unwed father in Illinois had no status regarding his children.

while the father was powerless to participate in any custody or adoption proceeding.[16] All of this changed in 1972, when the Court recognized an unwed father's due process right to be heard as to his fitness as a parent after the death of the natural mother of his children.[17]

After the death of the natural mother of Stanley's children, the children were declared wards of the State and placed with guardians.[18] The State of Illinois never afforded unwed father Stanley the opportunity to prove his fitness as a parent because "unwed fathers [were] presumed unfit to raise their children."[19] Under Illinois law, the State was able to demonstrate that the children were wards of the State because they had no surviving parent or because the parents did not provide adequate care.[20] However, the Illinois definition of parent did not include an unwed father.[21] Thus, under Illinois law, Stanley was neither entitled to prove he was a fit parent, because he was presumed unfit, nor was he considered a surviving parent.

The Court held that "the private interest . . . of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection."[22] The Court recognized that unwed fathers are entitled to equal protection and due process rights regarding their out-of-wedlock children, provided the unwed father actually participated in the upbringing and care of the children. This case removed the presumption that unwed fathers are not fit parents. However, the rights of unwed fathers regarding the adoption of their children was yet to be determined.

Quilloin v. Walcott[23] gave the Court the opportunity to examine the right of unwed fathers to consent to the adoption of their children. At issue was a Georgia law which provided that only the mother's consent was necessary for the adoption of an illegitimate child.[24] Leon Quilloin tried to stop the adoption of

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16 *See also* N.Y. DOM. REL. LAW § 111(c) (McKinney 1977), which only provided for the mother's consent for adoption of her child born out-of-wedlock.

17 *See Stanley*, 405 U.S. at 659.

18 *Id.* at 646.

19 *Id.* at 647.

20 *Stanley*, 405 U.S. at 649 (citing ILL. REV. STAT., ch. 37, §§ 702-1, 702-4, 702-5).

21 *See infra* note 15.

22 *Stanley*, 405 U.S. at 651.

23 434 U.S. 246 (1978).

24 Quilloin v. Walcott, 434 U.S. 246, 248 (1978). GA. CODE ANN. § 74-403(3) (Michie 1975) provided that in adoptions of illegitimate children, the consent of the mother alone shall suffice. In contrast, GA. CODE ANN. § 74-403 (1), (2) (Michie 1975) announced the rule, of which the former section is an exception, that living parents must consent to the adoption of a child.

his child by the natural mother's husband, although he had never tried to obtain custody of the child, had only recently sought legitimization, and had never accepted any responsibility for the child.[25]

Quilloin rested his appeal on the grounds that he was deprived due process and equal protection. First, Quilloin asserted that the State's denial of his attempt to legitimize his child violated due process.[26] However, the Court said the "result of the adoption . . . is to give full recognition to a family unit already in existence . . . . Whatever might be required in other situations, we cannot say that the State was required . . . to find anything more than that the adoption, and denial of legitimization, were in the 'best interests of the child.' "[27] Second, the Court found without merit Quilloin's equal protection argument that he should be afforded the same rights as a married father. Unlike a married father who had lived with his child, Quilloin never had any relationship with his son.[28] Accordingly, the Court held that Quilloin's due process and equal protection rights were not violated by the refusal to grant him veto power over the adoption.[29]

Although Quilloin was not given the right to consent to the adoption of his son, the Court's analysis suggests that it might have been willing to consider such consent if the circumstances were different: if Quilloin had taken some responsibility for his child's upbringing and had been a part of the child's life. Under these circumstances, the best interest of the child analysis might have forced the Court to hold otherwise.

The Court next dealt with unwed fathers' rights in *Caban v. Mohammed*.[30] Abdiel Caban and Maria Mohammed lived together for five years, during which time they had two children. Although Caban was married to another woman, he appeared on the birth certificate as each child's father.[31] Mohammed married

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25 *Id.* at 256.

26 *Id.* at 254. Quilloin did not attempt to legitimate his son during the years prior to Randall Walcott's filing the adoption petition. However, the record indicated that Quilloin did not know of the procedure until the petition was filed. *Id.* Note that the problem of an unwed father's ignorance of procedures to legitimatize their children, or to guarantee notice of an adoption is a recurring difficulty.

27 *Id.* at 255.

28 *Id.* Quilloin thought he should have been treated much like a married father who is separated or divorced from the mother and is no longer living with his child. The Court commented "we think appellant's interests are readily distinguishable from those of a separated or divorced father, and accordingly believe that the State could permissibly give appellant less veto authority than it provides to a married father." *Id.*

29 *Id.*

30 441 U.S. 380 (1979).

31 Caban v. Mohammed, 441 U.S. 380, 382 (1979).

another man and soon thereafter, sent both children to her mother in Puerto Rico to await her and her husband's arrival.[32] During this time, Caban remained in contact with the children through his mother, who also lived in Puerto Rico. On a trip to Puerto Rico, Caban visited the children and subsequently brought them back to New York.[33] After Caban refused to turn the children over to Mohammed, the Mohammeds obtained temporary custody of the children and then filed for adoption; the Cabans cross-petitioned for adoption.[34] The New York Surrogate Court granted the Mohammeds' petition for adoption, without obtaining Caban's consent.[35]

On appeal to the Supreme Court, Caban challenged the constitutionality of section 111 of New York Domestic Relations Law, which provided that only the mother's consent was necessary for the adoption of an out-of-wedlock child.[36] Since the statute gave only the natural mother an unqualified right to veto her child's adoption, even though the father may have had a substantial relationship with his child, the Court limited its scrutiny to "whether the distinction in § 111 between unmarried mothers and unmarried fathers [bore] a substantial relation to some important state interest."[37]

The Court found the distinction was not based on any difference between unwed mothers and fathers. In fact, the Court suggested that both mothers and fathers would refuse to consent to an adoption due to "natural parental interest shared by both genders alike[.]"[38] The effect of the New York law, the Court argued, was "to discriminate against unwed fathers even when their identity is known and they have maintained a significant paternal interest in the child."[39] As such, the Court concluded that this unwarranted distinction did not bear a substantial relationship to the State's interests.[40]

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32 *Id.*

33 *Id.* at 383.

34 *Id.*

35 *Id.* at 383-84.

36 *Id.* at 385 (quoting N.Y. DOM. REL. LAW § 111(c) (McKinney 1977)). However, § 111(a) stipulates that both parents' consent is necessary for the adoption of a child born in wedlock, with exceptions if the parent has abandoned the child or has been adjudicated incompetent to care for the child. *Id.*

37 *Id.* at 388. "Gender-based distinctions 'must serve important governmental objectives and must be substantially related to achievement of those objectives' in order to withstand judicial scrutiny under the Equal Protection Clause." Caban, 441 U.S. at 388 (quoting Craig v. Boren, 429 U.S. 190 (1976)).

38 *Id.* at 392.

39 *Id.* at 394.

40 *Id.* Justice Stewart, in dissent, argued that the distinction between unwed mothers

The Court continued to define the scope of an unwed father's rights in *Lehr v. Robinson*,[41] a due process challenge regarding an unwed father's right to be notified of an adoption. Jessica M. was born out of wedlock to Lorraine Robertson and Jonathan Lehr, who appeared as the father on the baby's birth certificate.[42] Eight months after the baby's birth, Lorraine married Richard Robertson.[43] Two years later, the Robertsons filed a petition for adoption, which was granted.[44] Lehr argued that the adoption should be invalidated because he did not receive prior notice.[45]

The New York statute at issue, section 111-a of the New York Domestic Relations Law, stipulates when notice to the natural father is required. This statute mandates notice for a father who is listed on the Putative Father Registry, whose name appears on his child's birth certificate, who has been adjudicated to be the father, whom the mother has sworn is the father in a written statement, who has married the mother within six months after the birth of the child, or who has openly lived with the mother and child and openly admits paternity.[46] Additionally, the New York Court of Appeals has held that the "primary purpose of [enacting] section 111-a was to enable the person served to provide the court with evidence concerning the best interest of the child."[47] Even though New York provides for notice for these categories of fathers, Lehr did not belong to any of the enumerated classes,[48] nor did he offer any evidence regarding the best interests of Jessica.[49] In fact, Lehr had never had any kind of relationship with Jessica, neither personal nor financial.[50]

In considering Lehr's due process and equal protection claims, the Court focused on whether the New York statute protects an unwed father's chance to develop a relationship with his

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and fathers does bear a substantial relationship to the State's "goal of promoting welfare of its children." *Id.* at 395 (Stewart, J., dissenting). Justice Stewart agrees with Justice Stevens in that "the mother will be the more, and often, the only, responsible parent, and that a paternal consent requirement will constitute a hinderance to the adoption process." *Id.* at 413 (Stevens, J., dissenting).

41 463 U.S. 248 (1983).

42 Lehr v. Robertson, 463 U.S. 250, 252 (1983).

43 *Id.* at 250.

44 *Id.*

45 *Id.* Lehr argued that he was entitled to notice and an opportunity to be heard before his child may be adopted, merely by virtue of being Jessica's biological father.

46 *Id.* at 251 (citing N.Y. DOM. REL. LAW § 111-a(2) (McKinney 1977 & Supp. 1982)).

47 *Id.* at 254. *See also* N.Y. DOM. REL. LAW § 111-a(3) (McKinney 1977 & Supp. 1982-83) which provided that the sole purpose of notice is to allow the person entitled to notice to present evidence relevant to the best interest of the child.

48 *Id.* at 251.

49 *Id.* at 254.

50 *Id.* at 262.

child; the Court called this an opportunity interest.[51] The Court examined whether New York's legislative response to *Stanley* assured notice to fathers who are likely to "have assumed some responsibility for the care of their natural children."[52] Section 111-a permits the unwed father to preserve his right to notice; at the very least, all he has to do is mail a postcard to the putative father registry.[53] Since the right to receive notice is completely within the father's control, the New York statute was held procedurally adequate in its protection of the unwed father's opportunity interest.[54]Accordingly, the Court did not uphold Lehr's due process challenge.[55]

Lehr's equal protection claim likewise failed. Unlike the natural father in *Caban* who maintained a relationship with his children, Lehr never fostered any kind of relationship with his child.[56] Since the *Caban* Court rested its opinion on the premise that Caban satisfied the biology plus relationship requirement, Lehr's lack of a relationship with his child precluded his equal protection claim.[57]

The Court most recently ruled on an unwed father's rights concerning the marital presumption in *Michael H. v. Gerald D.*[58] Carole, while married to Gerald, had an affair with Michael. Consequently, Carole became pregnant and gave birth to Victoria.[59] Although Gerald was listed as the father on the birth certificate, Carol told Michael that he was the father.[60] Michael wanted to assert his paternity, but was precluded from doing so because California law presumes that a child born while the mother is married to be a child of the marriage.[61]

In a plurality opinion, the Court stated that to protect a pu-

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51 *Id.* at 263-64.

52 *Id.* at 263.

53 Although the Court claimed that "ignorance of the law cannot be a sufficient reason for criticizing the law itself," unwed fathers such as Lehr may have no way of knowing how to preserve their rights as fathers. As such, these fathers will never be able to pursue the opportunity interest the Court says New York protects. *See id.* at 264. *See also* N.Y. Soc. Serv. Law § 372(c) (McKinney 1988) (establishes a putative father registry to keep track of persons intending to claim paternity of a child born out-of-wedlock).

54 *Id.* at 264.

55 *Id.* at 265.

56 *Id.* at 267.

57 *Id.* at 267-68 ("Jessica's parents are not like the parents in *Caban*. Whereas the Robertsons had a continuous custodial responsibility for Jessica, Lehr never established a custodial, personal, or financial relationship with her.").

58 491 U.S. 110 (1989).

59 Michael H. v. Gerald D., 491 U.S. 110, 113 (1989).

60 *Id.* at 113-14.

61 *Id.* at 115. The statute enumerating the marital presumption was Cal. Evid. Code § 621(a), (c), (d) (West Supp. 1989) (amended 1990).

tative father's right to maintain a relationship with his child, the right must be "traditionally protected by our society."[62] Although our society has protected the marital relationship, the Court argued, it has not protected the "power of the natural father to assert parental rights over a child born into a woman's existing marriage with another man."[63]

This case is significant because the plurality appears to have disregarded the biology plus relationship enumerated in cases such as *Quilloin* and *Caban.* This distinction may be explained by the existence of the marriage of Gerald and Carol, and the desire to sustain the sanctity of marriage in a time where the number of single parent families is increasing. Nevertheless, the dissent reiterated the notion that the biological link between the unwed father and the child needs to be accompanied by a parent-child relationship in order to warrant constitutional protection.[64]

In the twenty years since *Stanley v. Illinois* was decided, the Court has announced and clarified the rights of unwed fathers. As long as the father has a substantial relationship with his child, he can be assured the right to consent if his child is to be adopted.[65] In addition, the right to be notified of an adoption will be guaranteed if the State protects the father's opportunity interest in maintaining a relationship with his child and if the father accepts the opportunity.[66] Notwithstanding the decision in *Michael H.*, an unwed father will be afforded a constitutionally protected right to be heard and if applicable, consent to the adoption of his child.

II. NEW YORK'S EFFORTS TO COMPLY WITH *STANLEY* AND ITS PROGENY

Before *Stanley* acknowledged certain rights of unwed fathers, most states did not allow unwed fathers the opportunity to be heard or even consent to the adoption of their natural children. However, after *Stanley*, states were forced to amend their statutes to guarantee these fathers their constitutional rights. New York, for example, amended its Domestic Relations Law to permit putative fathers the right to be notified of an adoption.[67] After

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62 *Id.* at 122.
63 *Id.* at 125.
64 *See id.* at 142-43 (Brennan J., dissenting), 159-60 (White, J., dissenting).
65 *See* Caban v. Mohammed, 441 U.S. 380 (1979).
66 *See* Lehr v. Robertson, 463 U.S. 248 (1982).
67 *See* N.Y. DOM. REL. LAW § 111-a (McKinney 1988) (effective on Jan. 1, 1977). The purpose of notice to the natural father is to permit him to present evidence regarding

Caban, New York again changed its laws to allow an unwed father to consent to the adoption of his child, as long as certain requirements were met.[68] However, in 1990, New York faced an equal protection challenge to its consent statute.[69] Even though the Supreme Court had defined the scope of an unwed father's rights, the New York Court of Appeals was faced with a challenge that the Supreme Court had expressly reserved until another time.[70]

A. New York's Notice Requirement

Section 111-a of the New York Domestic Relations Law governs when notice is required to fathers of children born out-of-wedlock.[71] Although this statute was upheld in *Lehr* due to New York's attempt to preserve the opportunity of the unwed father to pursue a relationship with his child,[72] this statute remains problematic. First, the natural mother may decide not to tell the natural father that he has fathered a child. Without this information, the unwed father will never be able to seize the opportunity interest that the *Lehr* Court deemed so important[73]; he will not be listed on the birth certificate, will not be able to register with the putative father registry, and will not have the opportunity to claim paternity. Although the Court views these actions as within the unwed father's power,[74] the mother is under no requirement to inform the father of his paternity. Therefore, unless the natural mother divulges the identity of the father, this notice requirement does not protect the rights of unwed fathers.[75] Nevertheless, *Lehr* held that New York's notice requirement pro-

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the best interest of the child. *See* Alan D. Scheinkman, N.Y. DOM. REL. LAW § 111-a PRACTICE COMMENTARY (McKinney 1988 & Supp. 1992).

68 *See* N.Y. DOM. REL. LAW § 111 (McKinney 1988) (amended in 1980 to require consent of the unwed father, provided certain conditions were met). See also, Alan D. Scheinkman, N.Y. DOM. REL. LAW § 111 PRACTICE COMMENTARY (McKinney 1988 & Supp. 1992).

69 *See In re* Raquel Marie, 559 N.E.2d 418 (N.Y. 1990), *cert. denied sub nom,* Robert C. v. Miguel T., 111 S. Ct. 517 (1990). *See infra* notes 84-107, and accompanying text.

70 *See Caban*, 441 U.S. at 392 n.11 ("Because the question is not before us, we express no view whether such difficulties [attendant upon locating and identifying unwed fathers at birth] would justify a statute addressed particularly to newborn adoptions, setting forth more stringent requirements concerning the acknowledgement of paternity or a stricter definition of abandonment.").

71 N.Y. DOM. REL. LAW § 111-a. *See* notes 46-47 and accompanying text.

72 *See Lehr*, 463 U.S. at 265 and *see* notes 41-57 and accompanying text.

73 *See id.* at 263-65.

74 *See id.* at 264.

75 For a discussion of an unwed father's right to know if he fathered a child, *see* John R. Hamilton, Note, *The Unwed Father and the Right to Know of His Child's Existence*, 76 KY. L.J. 949 (1987-88). The author argues that an unwed father's right to know of his parenthood should be protected by law.

tects an unwed father's constitutional rights only when he has taken steps to maintain a relationship with his child.[76]

B. New York's Consent Statute

The New York statute concerning whose consent is necessary for adoption was at issue in *Caban.*[77] In the seventies, New York's consent statute, section 111 of the Domestic Relations Law, required only an unwed mother's consent to an adoption of her child.[78] The same statute, however, stipulated that both the mother and father must consent if the child was born in wedlock.[79] In effect, the mother, alone, of an out-of-wedlock child was capable of impeding the adoption of her child.[80] Since the Court found that the difference in the way the statute treated unwed mothers and fathers was unrelated to the State's interest in furthering adoptions,[81] New York was compelled to reformulate its consent statute.

In 1980, the New York legislature determined that an unwed father was entitled to consent to the adoption of his out-of-wedlock child if he maintained substantial and continuous contact with the child, as indicated by child support payments and either visiting the child monthly or maintaining regular contact with the child if unable to physically visit the child.[82] These requirements only applied to fathers of children who are placed for adoption more than six months after their birth. To accommodate fathers of children who are placed within six months of their birth, different conditions needed to be satisfied. The consent of the father was required if he had openly lived with the child or the mother for the six months preceding the placement, had openly held himself out to be the father, and had paid for pregnancy and birth expenses.[83] Although this statute was enacted in order to protect the unwed father's constitutional rights, the New York Court of Appeals recently held section 111(1)(e) of this law unconstitutional.[84]

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76 *Lehr*, 463 U.S. at 267-68.

77 *See* N.Y. DOM. REL. LAW § 111 (McKinney 1977).

78 Section 111(3) read [consent to adoption shall be required] [o]f the mother, whether adult or infant, of a child born out of wedlock. N.Y. DOM. REL. LAW § 111(3).

79 *See* N.Y. DOM. REL. LAW § 111(2) (McKinney 1977).

80 *See Caban*, 441 U.S. at 386.

81 *See id.* at 394.

82 N.Y. DOM. REL. LAW § 111(1)(d) (McKinney 1988) (amended 1980).

83 N.Y. DOM. REL. LAW § 111(1)(e) (McKinney 1988) (amended 1980 but held unconstitutional in *In re* Raquel Marie, 559 N.E.2d 418 (N.Y. 1990)).

84 *See In re* Raquel Marie X., 559 N.E.2d 418 (N.Y. 1990), *cert. denied sub nom,* Robert

III. THE EFFECT OF *RAQUEL MARIE* ON RIGHTS OF UNWED FATHERS

The consent statute's distinction between children who are placed within six months of birth and those placed more than six months after birth is paramount to the discussion of the constitutionality of section 111 of New York's Domestic Relations Law. As stated above, the conditions an unwed father must meet to afford him the right to withhold consent in the adoption of his child placed more than six months after birth focuses on his relationship with the child.[85] In contrast, under section 111(1)(e), which concerns children who are placed within six months of birth, the father's consent is premised upon both his relationship to the mother and how much money he contributed toward pregnancy and birth expenses.[86] One can understand why the legislature may have differentiated between newborns and infants; anything less than six months may not be enough time for the father to establish a relationship with his child. The legislators may have thought the father's acceptance of responsibility for the child would be evinced by how much money he spent toward the pregnancy or by his living with the child's mother. However, the court in *In re Raquel Marie X.*[87] held that focusing on the mother-father relationship to determine whether consent is necessary violates the natural father's constitutional rights.[88]

The New York Court of Appeals considered *In re Raquel Marie X.* and *In re Baby Girl S.* together, as both cases challenged the constitutionality of section 111(1)(e).[89] Raquel Marie was placed for adoption two months after birth, while Baby Girl S. was placed two days after her birth.[90] In each case, the parents had not lived with each other for a significant time before the children were placed for adoption.[91] Nevertheless, after the children were placed, the natural parents reunited and the natural fathers each sought custody of his child.[92]

In *Raquel Marie,* while the trial court found the natural parents had lived together, the father held himself out as Raquel

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C. v. Miguel T., 111 S. Ct. 517 (1990). *See also supra* notes 85-110 and accompanying text.

85 N.Y. DOM. REL. LAW § 111(1)(d).

86 N.Y. DOM. REL. LAW § 111(1)(e).

87 559 N.E.2d 418 (N.Y. 1990).

88 *See Raquel Marie,* 559 N.E.2d at 427.

89 *See In re* Raquel Marie X., 559 N.E.2d 418 (N.Y. 1990).

90 *Id.* at 420.

91 *Id.*

92 *Id.*

Marie's father, and had contributed to pregnancy and birth expenses, the Appellate Division concluded that the natural parents' relationship was "neither normal nor stable."[93] As such, the court held that the parents had not satisfied the living together requirement, and that the father had no right to veto the adoption.[94]

Baby Girl S. presented the court with a slightly different situation. Although the natural parents did not live together during the six months prior to the baby's placement for adoption, the natural father did not know of the mother's pregnancy, nor that he was the father.[95] The Surrogate Court granted the natural father custody of his daughter due to his inability to literally comply with the statute, but mainly in response to fraud on the part of the adoptive parents during the proceeding.[96]

The court, in deciding both cases in one opinion, first considered those Supreme Court cases that have delineated the rights of unwed fathers, and then examined the unwed father's constitutional interest regarding newborns.[97] In light of *Lehr* and *Quilloin*, Judge Kaye, writing for the New York Court of Appeals, concluded that the unwed father could lose his constitutional rights toward his newborn child if he failed to exercise his parental rights, or failed to form a legal bond.[98] On the other hand, a father who has promptly (in the six continuous months preceding placement for adoption) demonstrated that he is willing and able to enter into the fullest possible relationship with his newborn child should have an "equally fully protected interest in preventing termination of the relationship by strangers, even if he has not as yet actually been able to form that relationship."[99] Further, "he must both be a father and behave like one."[100]

Since the unwed father's interest is at issue, the court held that the statute promulgated by the State must further a "countervailing State interest, and there must be a close fit between the governmental objective sought and the means chosen to achieve it."[101] Although the court in *Raquel Marie* concluded that the State can deny an unwed father the right to consent if he has not

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93 *Id.*
94 *Id.*
95 *Id.*
96 *Id.*
97 *See id.* at 421-25.
98 *Id.* at 424.
99 *Id.* at 425.
100 *Id.* at 424.
101 *Id.* at 425.

assumed any parental responsibility, and may determine whether the father's relationship is substantial and prompt enough to warrant such a right,[102] the section 111(1)(e) "living together" requirement "render[ed] the statute unconstitutional as there [was] an insufficient fit with any valid State interest."[103]

The living together requirement of section 111(1)(e) focuses on the relationship between the father and the mother: how much time they have lived together or how much money the father has paid to support the pregnancy and birth.[104] Failure to satisfy this requirement permits adoption even if the father objects. And most importantly, the adoption will proceed despite the father's attempts to form a relationship with his child; an attempt "that would satisfy the State as substantial, continuous and meaningful by any other standard."[105] Therefore, the living together requirement of section 111(1)(e) does little to promote the opportunity interest of the unwed father. Even if he has seized the opportunity and has tried to establish a relationship with his infant child, failure to live with the natural mother for six months prior to the child's placement for adoption will preclude him from possessing veto power over the adoption.[106]

Because the court struck down the consent statute that applies to newborns, it enumerated an interim test for the courts to apply during the time it would take for the Legislature to enact new legislation.[107] For an unwed father to be permitted to withhold consent, and thus veto his child's adoption, the interim test requires that he must show parental responsibility, which in the case of a newborn, is a "willingness himself to assume full cus-

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102 *Id.*

103 *Id.* at 427.

104 *See id.* at 426. Even though it may be reasonable to have clear, objective standards regarding the right to consent, the court concluded that the living together requirement "cuts off [natural fathers'] interest [in shouldering parental responsibilities] by imposing as an absolute condition an obligation only tangentially related to the parental relationship[.]" *Id.*

105 *Id.*

106 *See id.* Although the State may have a substantial interest to ensure expedient adoptions, "the state's objective cannot be constitutionally accomplished with the sacrifice of the father's protected interest by imposing a test so incidentally related to the father-child relationship as this one, directed as it is principally to the father-mother relationship." *Id.*

107 *See id.* at 427-28 and *infra* notes 108-10 and accompanying text. The court emphasized that in setting forth the requirements for an unwed father's right of consent, it was "not prescribing necessary or even appropriate elements for any new statute, or speculating as to its constitutionality." *Id.* Although the court made it clear it was not writing a new statute, the court-imposed criteria have been in effect for more than two years because the Legislature has been unable to compromise as to the requirements of such as statute. As such, the courts have been applying what the court of appeals expressly denied were necessary or appropriate elements of a new statute.

tody of the child-not merely to block adoption by others. In this connection any unfitness, or waiver or abandonment on the part of the father would be considered."[108] Moreover, the "manifestation of parental responsibility must be prompt."[109] Courts may consider such factors as the father's public admission of paternity, payment of pregnancy and birth expenses, attempts to take legal responsibility for his child, and "other facts evincing a commitment to the child."[110]

A. Aftermath of Raquel Marie

Although the court's criteria may serve to protect an unwed father's seized opportunity interest, the standards are so broad as to entitle unwed fathers veto power who otherwise would not be notified of a pending adoption pursuant to section 111-a of the Domestic Relations Law. For example, under *Raquel Marie* an unwed father who has promptly accepted parental responsibility for his newborn child will be given the right to consent, even if he is not a member of one of the seven classes of unwed fathers who are entitled to notice of adoption.[111]

Although *Raquel Marie* goes far in protecting the rights of unwed fathers, one commentator suggests, while the court is concerned with determining whether a father is responsible and thus deservant of protected parental rights, it never considers the best interests of the child. According to that commentator, the courts will either grant custody to the unwed father and risk psychological harm to his child from being uprooted from his adoptive parents' home, or order the adoption and effectively ignore the

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108 *Id.* at 428.

109 *Id.* The court required prompt assumption of parental responsibility due to the line of Supreme Court cases which defined the scope of an unwed father's rights. *See* Stanley v. Illinois, 405 U.S. 645 (1972), Quilloin v. Walcott, 434 U.S. 246 (1978), Caban v. Mohammed, 441 U.S. 380 (1979), and Lehr v. Robertson, 463 U.S. 248 (1983).

110 *Id.*

111 *See* Alan D. Scheinkman, N.Y. DOM. REL. LAW § 111 PRACTICE COMMENTARY C:111:1 (McKinney Supp. 1992). The problem arises when an unwed father is listed with the putative father registry, for example, but he does not have a substantial and continuous relationship with his infant child. In this case, he will be entitled to notice, but not the right to consent. However, if the father maintained such a relationship, but failed to register with the putative father registry, he would be entitled to consent, but not to receive notice. This situation poses a problem because the *Raquel Marie* standards place a great weight on the father's relationship with the child, while the guarantee of notice is premised upon the father doing something public, such as claiming paternity. It clearly makes sense that the father who publicly acknowledges paternity should be notified of a pending adoption; however, the *Raquel Marie* test disregards this point and by focusing on the parent-child relationship ignores the State's interest in having unwed fathers take an active role in securing their due process rights. *See supra* notes 41-57 and accompanying text.

judgment that the unwed father is a fit parent.[112]

The two difficulties with *Raquel Marie* discussed above are not the only problems with this decision. It has become apparent in the two years since this case was decided that the *Raquel Marie* court did not address the constitutional rights, if any, of unwed fathers who have no idea they have fathered a child. The standards promulgated by that court, therefore, allow courts to determine which fathers' rights are protected and which are not. For example, in *In re Robert O. v. Russell K.*[113], the natural father urged the court to apply the reasoning of *Raquel Marie* to a father who did not know of his paternity, and thus protect his opportunity to form a relationship with his child.[114]

Robert O. was the natural father of Carol's child, although Carol never told Robert of her pregnancy.[115] After Robert and Carol ended their engagement, and Robert moved out, he did not maintain contact with Carol.[116] Consequently, he never knew of Carol's pregnancy. However, Carol informed Robert of his paternity 18 months after the baby was born, 10 months after the adoption was finalized and three months after Carol and Robert had married.[117] Robert immediately reimbursed Carol for the pregnancy and birth costs, registered with the putative father registry and attempted to vacate the adoption.[118]

Although the court appreciated Robert's efforts to assume some parental responsibility in an effort to have his opportunity interest protected, Judge Simons emphasized that an unwed father must manifest his parental responsibilities promptly, that is, within the six continuous months preceding his child's placement for adoption.[119] Since Robert did not act on his willingness to assume custody of his child in a prompt fashion, the Court declined to extend constitutional protection to Robert's interest in establishing a relationship with his child.[120] Additionally, Judge Simons objected to Robert's attempt to liken the opportunity he

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112 *See* Daniel C. Zinman, Note, *Father Knows Best: The Unwed Father's Right to Raise His Infant Surrendered for Adoption*, 60 FORDHAM L. REV. 971, 972-73 (1992).

113 No. 191, 1992 N.Y. LEXIS 3478 (Oct. 27, 1992).

114 *See In re* Robert O. v. Russel K., No. 191, 1992 N.Y. LEXIS 3478 (Oct. 27, 1992).

115 *Id.* at *1.

116 *Id.*

117 *Id.* at *2.

118 *Id.*

119 *See id.* at *7-*11.

120 *See id.* at *10-*11. "Promptness is measured in terms of the baby's life not by the onset of the father's awareness. The demand for prompt action by the father at the child's birth is neither arbitrary nor punitive, but instead a logical and necessary outgrowth of the State's legitimate interest in the child's need for early permanence and stability." *Id.* at *12.

wanted protected to the opportunity that was protected in *Raquel Marie*; the opportunity to develop a relationship to the unwed father's child.[121] Robert, the court concluded, was not entitled to constitutional protection of the "opportunity to manifest his willingness to be a custodial parent."[122]

In re John E. v. John Doe[123] proved to be another troubling application of *Raquel Marie* to a set of facts involving a natural father who was mislead by the natural mother. Daniel was conceived as the result of an extramarital affair between John E. and the natural mother.[124] Daniel was placed for adoption four days after he was born.[125] Almost one-and-a-half months after Daniel's birth, the natural father sought custody and an order of filiation because he did not appear as Daniel's father on the birth certificate,[126] even though the natural mother acknowledged his paternity.[127] To determine if the natural father's consent was necessary for this adoption, the court applied the interim standards enumerated in *Raquel Marie*.[128] Although the natural mother and father lived together for approximately three months, this fell short of the requirement that the mother and father live together for six months prior to the placement.[129] Additionally, during this six month period, the father only contributed $100 toward pregnancy expenses, never publicly acknowledged his paternity, and never attempted to establish his paternity.[130] The court focused on the natural father's inability to meet the requirements set forth in *Raquel Marie*, in addition to his testimony indicating that he was content with the natural

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121 *Id.* at *13-*14.

122 *Id.* The court's analysis regarding Robert's constitutional interest is troublesome. In the case of a newborn placed for adoption, it is practically impossible for an unknowing unwed father to manifest his willingness to assume parental responsibilities. As such, whatever steps the father may take upon learning of his paternity will be effectuated too late to permit a constitutional interest. Thus, any father in the position of Robert has no way of protecting his opportunity to establish a relationship with his child even if he pays for pregnancy and birth expenses or attempts to establish legal responsibility for his son or daughter. The only way for men like Robert to ensure their rights are preserved would be to compel mothers to testify as to the paternity of their children. But as Judge Simons wrote, "even if it were constitutionally permissible to compel disclosure, the State has not chosen to do so and the Constitution does not compel it." *Id.* at *16.

123 564 N.Y.S.2d 439 (1991).

124 *In re* John E. v. John Doe, 564 N.Y.S.2d 439, 440 (App. Div. 1991).

125 *Id.*

126 *Id.*

127 *Id.* at 449 (Thompson, J., dissenting).

128 *See id.* at 442-43.

129 *Id.* at 442.

130 *Id.* at 442-43.

mother and her husband raising Daniel.[131] As such, the court concluded that the natural father's "qualifying interest is nothing more than an effort to block Daniel's adoption by the respondents, whom he considers to be strangers, rather than assume custody himself."[132] The court held that the natural father's "manifestation of interest was neither sufficiently substantial nor prompt to require constitutional protection."[133]

The court's approach in this case was to examine the best interests of Daniel, even after the natural father's claim was rejected.[134] It appears the court was attempting to justify its decision to leave Daniel with the adoptive parents. Even if the natural father had proffered enough evidence concerning his attempts to seize his opportunity to satisfy the court, the best interest of the child analysis may have nevertheless resulted in leaving Daniel with his adoptive parents.[135]

The dissent characterized the natural father as attempting to assume parental responsibility, even though his efforts were thwarted by the natural mother.[136] Accordingly, the dissent argued that the natural parent should not have been deprived of

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131 *See id.* at 443.

132 *Id.* 443-44. After rejecting the natural father's claim, the court further questioned his motivation in seeking custody by examining the care Daniel would get if the father were awarded custody. According to the natural father, Daniel would be placed in a day care center run by the natural father's daughter. *Id.* at 382. Even if the natural father were unable to care for Daniel every minute of the day, many parents these days are forced to send their children to day care. As such, the court's inquiry into the care Daniel would get from his natural father seems to serve no purpose but to strengthen the argument for placing Daniel with the adoptive parents, for they are a two parent couple and the adoptive mother only works two days a week. *See id.* at 444.

133 *Id.* at 444.

134 *See supra* note 132.

135 *See id.* at 444. The two experts who testified indicated that the adoptive parents were "well-prepared, involved parents." Moreover, removing Daniel from his adoptive parents, with whom he has spent his entire life, would result in serious emotional damage. According to one psychologist, such removal would causes difficulties in Daniel's ability "to relate to people in a secure and meaningful manner and it might interfere with his potential." *Id.*

See also id. at 446-47 (Rosenblatt, J., concurring) "I cannot see how the liberty interests of this father, under the facts of this case, can prevail over Daniel's interest to grow up free of avoidable, severe emotional scarring." *Id.* at 447 (Rosenblatt, J., concurring).

For a discussion of the dynamics of the parent-child relationship, *see* JOSEPH GOLDSTEIN, ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 9-28 (1979).

136 *See id.* at 450-51 (Thompson, J.P., dissenting). Judge Thompson appears to have read quite a different version of the hearing testimony than did his colleagues in the plurality. According to Judge Thompson, the natural father delayed his attempts to seek custody because he believed the natural mother only returned to her husband to clarify the situation regarding her teenage son, not out of any disregard for his child. *Id.* at 450. Further, although the plurality focused on the mere $100 the natural father paid toward the pregnancy expenses, the dissent argues that the natural father offered to do much more, including supporting the child after his birth, but that the mother refused any assistance. *Id.*

custody of Daniel even though he and Daniel had no relationship.[137]

The divergence between the plurality and dissenting opinions in this case illuminates the difficult balance of guaranteeing a natural father his constitutional rights, on the one hand, and serving the best interests of the child, especially when the natural father has been deprived of the chance to assert his parental rights until it is too late, on the other hand. Notwithstanding this difficulty, in an effort to protect the rights of unwed fathers of children placed for adoption within six months after birth, *Raquel Marie* assumed that the father knew of his paternity.[138] In the situation where the father delayed in asserting his parental responsibilities, *Raquel Marie* does not protect the unwed father's interest in developing a relationship with his child.[139] However, the father who learns about his child in the time *after* the child's birth loses the opportunity to assert any responsibility, and thus loses his constitutional protection.[140]

IV. Proposed Replacement Statute

The infirmity of the interim standard enumerated in *Raquel Marie* indicates that the New York Legislature, in an effort to elucidate the rights of unwed fathers in New York, needs to approve a replacement statute for section 111(1)(e) of the Domestic Relations Law. The statute must clearly delineate the circumstances when an unwed father's consent is constitutionally required.[141] In addition, the Legislature must determine if it wishes to provide protection for fathers such as Robert O., who are informed of their paternity long after the child was born.[142]

In the years since *Raquel Marie* was decided, both the New York Senate and Assembly have proposed replacement legisla-

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137 *Id.* at 451-52. "Contrary to the plurality decision, I do not believe that the State's interest in facilitating the adoption of out-of-wedlock children will be served by allowing a concerned and fit father to be deprived of custody of his child where the natural mother at every turn has thwarted his efforts to establish a relationship with the child." *Id.* at 452.

138 *See In re* Raquel Marie X., 559 N.E.2d 418 (N.Y. 1990) and *supra* notes 85-110 and accompanying text.

139 *See id.* If the unwed father does not promptly manifest his parental responsibilities, his interest in establishing a relationship with this child is not constitutionally protected.

140 *See id.* at 865. *See also In re* Robert O. v. Russell K., No. 191, 1992 N.Y. LEXIS 3478 (Oct. 27, 1992), *supra* notes 113-22 and accompanying text.

141 *See* Joseph R. Carrieri & Mary Meyer, *Outside Counsel: The Rights of Putative Fathers*, N.Y. L.J., Aug. 7, 1992, at 1, 29.

142 *See In re Robert O.*, 1992 N.Y. LEXIS 3478 at *2-*3.

tion for section 111(e)(1).[143] Assembly Bill 10989 proposes that consent of an unwed father should be required if he is entitled to notice under section 111-a of the Domestic Relations Law; if prior to placement of the child, he openly admits paternity, unless he is prevented from doing so; if he has paid for pregnancy and birth expenses, unless he was prevented from doing so; and if he files a motion to intervene in proceedings to terminate parental rights, including an assertion of paternity and a request for custody.[144]

The Senate's proposed legislation requires the father's consent if he has publicly admitted paternity; if he has filed to establish paternity prior to the child's birth; if he has paid toward birth and maternity expenses, or offered to pay and was prevented from doing so; and if he has filed to obtain custody of his child no

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143 *See* A. 10989, 1991-92 Reg. Sess. (1992) and S. 3776-B, 1991-92 Reg. Sess. (1992). These are the most recently proposed bills. Other versions were proposed in the past, but died in committee. Telephone Conversation with Adrienne Johnson, New York State Assemblyman Vann's staff member (Sept. 24, 1992).

Senate Bill 3776-B amends Domestic Relations Law § 111(1)(e) to read, in pertinent part, [consent is necessary]:

> Of the father, . . . of a child born out-of-wedlock who is under the age of six months at the time he is placed for adoption but only if: (i) such father openly held himself out to be the father of such child during the six months immediately preceding the placement of the child for adoption; and (ii) prior to the birth of the child such father filed a petition in a court of competent jurisdiction where the mother of the child resides seeking to establish paternity of such child . . . and (iii) such father paid a fair and reasonable sum, in accordance with his means, for the medical, hospital and nursing expenses incurred in connection with the mother's pregnancy or with the birth of the child during the six months immediately preceding the placement of the child for adoption or offered to pay such sum during such period and was prevented from doing so; and (iv) such father has initiated judicial proceedings . . . to obtain sole custody of the child no later than thirty days after the mothers executes a consent or surrender of the child for adoption . . .

Proposed Assembly Bill 10989 to amend Domestic Relations Law § 111(1)(e), reads, in pertinent part, [consent is required]:

> . . . of the father of a child born out-of-wedlock who is under six months at the time he or she is placed for adoption, but only if; (i) such father is a person entitled to notice pursuant to subdivision two of section one hundred eleven-a of this article or subdivision two of section three hundred eighty-four-c of the social services law; and (ii) such father openly held himself out to be the father of such child prior to the placement for adoption, unless prevented from so doing by the person or agency having lawful custody of the child; and (iii) such father paid a reasonable and fair sum, in accordance with his means, for the medical, hospital and nursing expenses incurred in connection with the mother's pregnancy or with the birth of the child, unless prevented from so doing by the person or agency having lawful custody of the child; and (iv) upon receiving notice of an adoption proceeding pursuant to the provisions of this chapter . . . such father filed a motion to intervene in the proceeding, including an assertion of paternity and a request for custody, within thirty days of the date of such notice . . . .

144 *Id.*

more than 30 days after the mother consents to the adoption.[145]

The Assembly bill stipulates that the ability to consent is premised upon being entitled to notice. While this circumvents the problem *Raquel Marie* posed by allowing fathers to consent who are not entitled to be notified under New York law, the problem of the "unknowing father" persists. If the father does not know of his paternity, he can neither meet the requirements of section 111-a and thus be entitled to notification of the adoption, nor will his consent be required. Moreover, this proposed statute makes consent contingent upon the father taking some action to establish his paternity. The Senate bill similarly precludes requiring consent from a father who has no knowledge of his paternity, because he will be unable to meet the requirements of filing for paternity before the baby's birth and publicly acknowledging his paternity.[146]

It appears that the Legislature has made a policy choice that consent is required only by those fathers who have knowledge of their paternity and who have taken some responsibility for their parenthood. Although it may seem inherently unfair to forbid a father to attempt to establish a relationship with a child he only recently learned about, the best interests of the child should be a substantial factor in any such analysis. Thus, it may be proper to limit the manifestation of the father's paternity to the period before the child is placed for adoption.[147] Otherwise, children will be living and bonding with their adoptive parents, while their unwed fathers will be attempting to gain custody of children they have never met.

The problem, however, is even more serious when the mother deceptively hides the truth from the natural father. In this situation, the father is never given the opportunity to pay any expenses or acknowledge his paternity. It is ironic that in an effort to stop fathers from merely blocking an adoption though having no intention of forming a relationship with his child, fathers who would proudly accept parental responsibility are never given the chance to do so. Nevertheless, adoption is about children, and about giving them a stable and loving environment in which to grow. By allowing an unwed father the chance to disrupt a young child's life in an effort to announce his paternity,

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145 *Id.*

146 *See* S. 3776-B.

147 *See In re* Raquel Marie, 559 N.E.2d 418, 425 (N.Y. 1990) ("The unwed father's right is decidedly limited in duration.").

the State would be disregarding the best interest of the child.[148]

This commentator suggests, therefore, in light of the aftermath of *Raquel Marie* and the inability of the Legislature to agree on new legislation, that the replacement legislation for section 111(1)(e) of the Domestic Relations Law should provide simple, clear and objective standards. Since *Raquel Marie* technically invalidated the living together requirement,[149] the new statute should focus on the father's willingness to accept responsibility for his child. To consent, the unwed father should pay reasonable pregnancy and birth costs, openly declare paternity, and take some steps to form a legal relationship with the child by either filing with the putative father registry, filing with the courts to establish paternity, or seeking custody.[150] In cases where the mother has prevented the father from asserting himself, the courts should give the father the opportunity to present evidence concerning his efforts as well as the mother's deception or fraud. In this way, New York will preserve the rights of unwed fathers enumerated by the Supreme Court over the last twenty years.[151] However, the courts should likewise seek to balance the right of a child to remain in a stable environment and not to endure emotional scarring due to a change in custody with the countervailing interest of an unwed father who has recently learned of his paternity.

CONCLUSION

In the twenty years since *Stanley v. Illinois* was decided, the rights of unwed fathers have been examined and defined by the Supreme Court. According to the Court, an unwed father has a constitutionally protected interest in his child if he promptly manifests his parental responsibilities. However, the Court has yet to consider the problem confronted in *Raquel Marie*: is an unwed father who has been physically unable to have a relationship with his newborn child entitled to constitutional protection

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148 *See* Bennett v. Jeffreys, 356 N.E.2d 277 (N.Y 1978). This case stands for the proposition that where extraordinary circumstances are present with respect to a parent's right to bring up her child, the best interest of the child is regarded as superior to the right of parental custody. Extraordinary circumstances is defined as surrender, abandonment, persisting neglect, unfitness or prolonged separation between parent and child.

149 *Raquel Marie*, 559 N.E.2d at 426.

150 The filing requirement would ensure the father is entitled to notice under New York Domestic Relations Law section 111-a, thus alleviating the problem caused by *Raquel Marie* - allowing fathers to veto an adoption when they have not even qualified for notification.

151 *See supra* notes 13-66 and accompanying text.

of that relationship and therefore be permitted to consent or veto the adoption of his child? The New York Court of Appeals' declared that such fathers do have constitutional protection as long as they promptly manifest parental responsibilities; that is, in the six months prior to placement of the child. Accordingly, the court held the consent statute at issue unconstitutional because it focused on the relationship between the father and the mother, instead of on the ties between the father and child.

Notwithstanding passage of replacement legislation for section 111(1)(e) of the Domestic Relations Law, a mother is not required to disclose the identity of the natural father of her child. As such, these "unknowing fathers" are powerless to manifest any parental responsibilities. But even though there may be thousands of men who do not know they have fathered a child, their rights regarding children whom they have never met should not be superior to the State's interest in promoting the best interests of children. Moreover, deciding which unwed fathers deserve protection belongs with the legislature, not with a court which may not be acutely aware of the problems confronted by them.

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